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IN THE
Supreme Court of the United States

October Term 1967

No. **247**

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Puyallup Tribe, a Federal Organization, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Washington State Supreme Court in the above entitled case, the opinion of which was filed on the 12th day of January, 1967, and which became a final judgment on March 13, 1967, according to remittitur of Supreme Court dated March 15, 1967.

REFERENCES TO THE RECORD

Arrangements have been made through the stipulation of the parties and the cooperation of the Clerk of the

Washington State Supreme Court and by order of the Washington State Supreme Court to forward the entire original record to the Supreme Court.

References to the record are made herein as follows:

<i>Portion of Record Cited</i>	<i>Abbreviation Used</i>
Brief of Appellants	(R, BA, —)
Statement of Facts (verbatim record of the proceedings before the trial court)	(R, St, —)
Transcript (record of pleadings, motions, orders, etc., filed with the trial court)	(R, Tr, —)

OPINIONS BELOW

The memorandum opinion of the Pierce County Superior Court is unreported and is printed in Appendix B, *infra*, pp. A-14 - A-34. The opinion of the Washington State Supreme Court is printed in Appendix B hereto, *infra*, pp. A-34 - A-66, and is reported in 70 W.D.2d, p. 241 (1967). The remittitur by the Washington State Supreme Court to the Pierce County Superior Court is printed in Appendix B hereto, *infra*, p. A-67. The Pierce County Superior Court, in its ministerial function in compliance with the remittitur, entered the amended injunction which is unreported and is printed in Appendix B hereto, *infra*, p. A-68.

JURISDICTION

The opinion of the Washington State Supreme Court was filed on January 12, 1967 (Appendix B, *infra*, pp. A-34 - A-66) and became a final judgment of said court on March 13, 1967. The remittitur issued March 15, 1967 (Appendix B, *infra*, p. A-67). The Pierce County Superior

Court in its ministerial function entered the final order (amended injunction) pursuant to the direction of the Washington State Supreme Court on June 2, 1967 (unreported, printed in Appendix B, *infra*, p. A-68.).

The jurisdiction of the court is invoked under 28 U.S.C. Section 1257(3). The question of jurisdiction was raised in the court of first instance and in the appellant court as hereinafter set forth, in the Statement, under the heading, "Stages at Which Federal Questions Were Raised."

QUESTIONS PRESENTED

1. Can the State of Washington by the exercise of the police power regulate rights reserved by Indians in treaties with the United States? If such power exists, what, if any, are the limitations of the State's power to regulate?

2. Do the courts of the State of Washington have jurisdiction to:

- (a) hear an action against an Indian Tribe without the consent of the Tribe or the United States Government?
- (b) determine that an Indian reservation does not exist where such reservation was established by treaty and never terminated by Congress?
- (c) determine the extent of the rights, privileges or immunities of an Indian's or Indian Tribe's Treaty with the United States Government with respect to fishing and further to affirmatively limit such rights, privileges or immunities to the same extent that all other citizens are limited.

3. Is the use of an injunction constitutionally valid to prohibit future criminal actions by an organization and its members and particularly where all of the members

are not before the court? Is the use of the injunction justified under the circumstances of this case?

THE TREATY AND STATUTES INVOLVED

The Treaty involved is that certain treaty known as the "Treaty of Medicine Creek." It is published in 10 Stat. at p. 1132, and is set forth in Appendix A, *infra*, pp. A-1 - A-9.

The Statutes involved are as follows:

62 Stat. 757, 18 U.S.C. 1151, Appendix A, *infra*, p. A-9.

67 Stat. 588, 18 U.S.C. 1162, Appendix A, *infra*, pp. A-9 - A-10.

Chapter 37.12, Revised Code of Washington, Appendix A, *infra*, pp. A-10 - A-13.

STATEMENT

1. Pleadings and Prior Proceedings

The State of Washington in its Complaint alleged that the Puyallup Tribe claimed special privileges and immunities from the application of state conservation laws and regulations to which it was not lawfully entitled. It asked the court to declare these claimed privileges and immunities void, and asked that the Tribe be permanently enjoined from destroying the fish runs in the Puyallup River (R., Tr. 1-6). The Tribe answered by denying the court had any jurisdiction over the persons or subject matter of the action and asserted that it was exercising its rights under the Medicine Creek Treaty of 1854 (R. Tr. 9-12).

The Superior Court, after trial found that the Puyallup Indian Tribe did not exist, that the Puyallup Indian Reservation did not exist, and that the State laws and regulations were reasonable and necessary to preserve the fishery (R., Tr. 95-102). The trial court then issued an

injunction prohibiting the Tribe from fishing in Commencement Bay and the Puyallup River contrary to the laws and regulations of the State of Washington (R., Tr. 103).

The Supreme Court of the State of Washington affirmed the trial court in all respects, except it ruled that the court had no jurisdiction to determine the non-existence of the Puyallup Tribe and that the injunction was too broad. The Supreme Court ordered the Superior Court to limit its injunction to those regulations that were reasonable and necessary to the preservation of the fishery (Appendix B, *infra*, p. A-52). The trial court, in its ministerial function, subsequently modified its injunction pursuant to the Supreme Court's direction and prohibited net fishing by the Tribe (Appendix B, *infra*, p. A-68).

2. Stages at Which Federal Questions Were Raised

In addition to the Answer denying jurisdiction and asserting the validity of the Medicine Creek Treaty, the Tribe raised by pre-trial motion (R., St. 4-11) (R., Tr. 15, 16) (R., Tr. 19-21) (R., Tr. 47-54), by motion and objections during the trial (R., St. 1364-1366), by post trial argument (R., Tr. 47-54), and by Assignment of Error to the Supreme Court of the State of Washington (R., BA 6, 7) the following matters among others:

"2. The Injunctive Order permanently enjoining appellants from violating state fisheries laws is invalid as such remedy is not available to enjoin such violations as to all citizens and appellants were denied the equal protection of the law.

"4. The lower court erred as it lacked jurisdiction in the cause as an Indian Tribe cannot be sued with-

out its consent and without the consent and authorization of the Congress of the United States.

"5. The lower court erred in making its declaratory judgment and entering its permanent injunction, as a Federal Treaty is supreme and controlling over state statutes and its terms cannot be abrogated by a State court.

"6. The lower court had no jurisdiction to terminate the existence of the Puyallup Indian Tribe and its declaratory judgment and injunctive order based upon such determination are invalid.

"8. The lower court erred in completely prohibiting and abolishing the reserved Treaty rights of the Puyallup Indian Tribe to fish within the exterior boundaries of the original Puyallup Indian Reservation including lands actually held in Tribal ownership, and its Declaratory Judgment and Injunctive Order are invalid.

"9. The lower court was without jurisdiction to abolish, terminate, or constrict the Puyallup Indian Reservation.

"10. The lower court was without authority to abrogate one of the terms of a Federal Treaty by completely abolishing the 'off-reservation' Treaty fishing rights of the Puyallup Indian Tribe.

"11. The 'off-reservation' Treaty fishing rights of the Puyallup Indian Tribe are not subject to restriction in any manner where there is no proof that such restriction is indispensable for the conservation of fish, and the lower court's judgment and injunction abolishing those rights are invalid."

The trial court answered the Tribe's jurisdictional arguments and authorities by the following statement in its memorandum decision:

"Since the beginning of the action, the defendants have sought to have the same dismissed, on the grounds that this court does not have jurisdiction. This motion to dismiss has heretofore been denied,

and the court adheres to the previous rulings without further comment." (Appendix B, *infra*, p. A-15.)

There are no findings of fact or conclusions of law relating to jurisdiction by the Trial Court. The majority of the Supreme Court held that the trial court had no jurisdiction to determine tribal existence and the courts of the State could not repudiate treaties of the United States. The Supreme Court made no opinion or comment on its or the trial court's jurisdiction to determine the existence of an Indian reservation or the requirement that an Indian tribe cannot be sued without its consent or the consent of the United States.

3. Essential Facts

* This controversy has arisen from an interpretation of the Treaty of Medicine Creek of December 26, 1854, 10 Stat. 1132 (Appendix A, *infra*, pp. A-1 - A-10), which Treaty was entered into between the Puyallup Indian Tribe of the Puyallup Reservation as one of the signers thereof and the United States government. Article 2 of the Treaty, under which the Indians relinquished the bulk of their original lands, provided for the establishment of a reservation for the Puyallup Tribe. It provides as follows:

"... and a square tract containing two sections, or twelve hundred and eighty acres lying in the south side of Commencement Bay, all of which tracts shall be set apart and so far as necessary surveyed and marked out *for their exclusive use*. . . ." (Emphasis supplied)

government, in consideration of the relinquishment of By virtue of Article 3 of the Treaty, the United States

these vast holdings of land, promised and reserved to the Indians:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory. . . ."

These two treaty provisions have been construed to provide for two different types of Indian fishing rights. The first is fishing within the exterior boundaries of the reservation, which has been construed to be exclusively the right of the Indian Tribe without interference or regulation of the State. The second is fishing off the reservation at the usual and accustomed grounds and stations in common with other citizens, which has been construed to permit limited state regulation.

At the time this action was commenced in the court of first instance, the Indians were netting salmon and steelhead, both on and off the reservation, pursuant to their Treaty fishing rights. Their catch amounted to about three (3) to five (5) percent of the total fish catch from the Puyallup River anadromous fish runs (Appendix B, *infra*, p. A-32).

The State's expert witnesses testified to the many variables affecting the size of the fish run such as commercial fishing, pollution, natural predators, sports fishing and Indian fishing. They indicated that, due to the losses of fish occurring from these variables, by the time the fish run arrived at the Tribe's Indian reservation and usual and accustomed fishing areas (Commencement Bay and Puyallup River) there were only enough fish left for the preservation of the fishery. The only fishing that could thereafter be permitted was low efficiency hook and line

sport fishing. The significance of this is that the bulk of the fish do not feed in the bay and river and consequently are difficult, if not almost impossible, to catch by permissible sport fishing methods,¹ (R., St. 856-862). The only method available to the Indians to catch fish with any degree of certainty is net fishing. The state regulations prohibit net fishing in Commencement Bay and the Puyallup River, and these regulations are now enforced against the Puyallup Indians by the court's injunction (Appendix B, *infra*, p. A-68).

REASONS FOR GRANTING THIS WRIT

1. The decision of the court below in the instant case specifically repudiates the decision of the Ninth Circuit Court of Appeals, in *Maison v. Confederated Tribes of Umatilla Reservation*, 314 F.2d 169 (C.A. 9th, 1963) (Appendix C, *infra*, pp. A-70 - A-78). This conflict was conceded by the Washington State Supreme Court on p. 253 of its opinion (Appendix B, *infra*, p. A-48), as follows:

"The appellants have seized upon certain language in the recent case of *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, *supra*, as establishing the rule that the particular regulation sought to be imposed by the state must be shown to be 'indispensable' to the preservation and protection of the fishery sought to be regulated before it can be enforced against Indians claiming treaty rights to fish at 'usual and accustomed grounds and stations.'"²

1. The exception is steelhead fish which composes a small percentage of the run. It was admitted by Dr. Donaldson, a State witness, that in 1956 the sportsmen caught 18,500 steelhead to the Indian's 1,500 steelhead, and it is to be noted that the sportsmen fish up river from the Indian net fishery (R., St. 143, 144).

2. The Tribe raised this question at the lower court through several motions and objections and again by Assignment of Error to the Washington State Supreme Court. See the Tribe's 11th Assignment of Error (R., BA 7).

In answer to the above question raised by the Tribe, the Washington Supreme Court on p. 254 of its opinion (Appendix B, *infra*, p. A-49) stated:

"We are convinced that the three judges of the 9th Circuit Court of Appeals, who decided the *Maison* case, *supra*, read too much into the Supreme Court's use of the word 'indispensable' in the *Tulee* case and have created therefrom a completely unworkable standard for determining what regulations relative to the time and manner of fishing outside the reservation may be imposed on the Indians claiming treaty rights."³

The present state of the law on this matter in the Pacific Northwest is greatly confused for the reason that there are three (3) different rules applicable in the three (3) different states. The State of Idaho follows the *Arthur* rule, which holds that Idaho may not regulate the activities reserved by an Indian treaty right. *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953) (fully discussed by Justice Donworth in *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400 (1957), Appendix C, *infra*, p. A-77). The State of Oregon, under the rule of the *Maison v. Confederated Tribes of Umatilla Reservation*, *supra*, (Appendix C, *infra*, pp. A-70 - A-78), permits regulation where the State can show that such regulations are indispensable. The State of Washington, under this case, has complete power to regulate where it can be shown that the regulations are reasonable and necessary, even though this in effect can prohibit Treaty fishing rights and in effect abrogates a portion of a federal treaty by placing Indians in the same status as all citizens.

There are presently thirty-six (36) tribes in the State

3. The *Tulee* case referred to by the Washington State Supreme Court is reported in 315 U.S. 681 (1942).

of Washington, with 18,582 tribal members. There are also tribes in Oregon and Idaho affected by this ruling. Practically all of them have similar treaty provisions. Some of these tribes have treaty rights to hunt and fish in two (2) states. For example, the Yakima Tribe exercises such treaty right in the State of Washington and Oregon, where they would in effect have two different rules applied, depending on whether they are exercising this treaty right in the State of Washington or in the State of Oregon. Undoubtedly, the three (3) learned judges of the Ninth Circuit Court of Appeals in the *Umatilla* case could foresee that any State regulation would have to be limited so as to protect the interest of the Indian Tribes, which are a minority group because not to do so would result in a total prohibition of a Treaty fishing right as in the instant case.

The question now is, which rule should be applied? This can only be determined by the United States Supreme Court.

2. The majority of the Washington Supreme Court and the trial court totally ignored the question raised by the Tribe, can a tribe be sued without its consent or the consent of the United States. The rule that a tribe may not be sued without its consent or the consent of the United States is well established by numerous federal cases including the United States Supreme Court. *United States v. United States Fidelity & Guaranty Company*, 309 U.S. 506 (1940) at pp. 512 and 513 (Appendix C, *infra*, pp. A-104 - A-112).

3. The Washington State Supreme Court decided that a reservation no longer existed principally on the basis

that nearly all of the land had been alienated by the Indians (Appendix B, *infra*, p. A-43). The United States Congress has enacted law directly contrary to the holding of the Washington State Supreme Court as to the effect of allotments of land and subsequent alienation by the Indians. In 62 Stat. 757, 18 U.S.C. 1151 (Appendix A, p. A-9), "Indian country" is defined in part as follows:

"Except as otherwise provided in sections 1154 and 1156 (liquor offenses) of this title, the term 'Indian country,' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, *notwithstanding the issuances of any patent*, and, including rights-of-way running through the reservation. . . ." (Emphasis supplied)

Only Congress has the power to abolish a reservation. *United States v. Celestine*, 215 U.S. 278 (1909).

The Enabling Act of the State of Washington states that "Indian land shall remain under the absolute jurisdiction and control of the United States. . . ." 25 Stat. 676. There can be no doubt that the United States reserved regulation of on-reservation treaty fishing by the provisions of 67 Stat. 588, 18 U.S.C. 1162, which is quoted in the next section of this petition and specifically excepts fishing rights as a subject matter of state regulation within Indian country.

The State has no authority to terminate a reservation nor has it the authority to regulate Indian treaty fishing rights within a such reservation. It should also follow that the State of Washington has no right to eliminate on-reservation fishing rights by termination of the existence of the reservation.

4. The source of the State's right to regulate is *dicta* in the *United States v. Winans*, 198 U.S. 371 (1905) and *Tulee v. State of Washington*, 315 U.S. 681 (1942), cases heard before the U.S. Supreme Court. Since these cases were determined, Congress has enacted laws indicating it did not intend to grant such jurisdiction and power to determine Indian treaty fishing rights to the States, 67 Stat. 588, 18 U.S.C. 1162 (which grants jurisdiction over criminal actions in Indian country to the States (Appendix A, *infra*, pp. A-9, A-10)) provides, in Section, (b):

"Nothing in this section shall . . . deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

The State of Washington has accepted criminal and civil jurisdiction over "Indian country" by the adopting, in 1957, of Chapter 37.12, Revised Code of Washington (Appendix A, pp. A-10 - A-13). R.C.W. 37.12.060 prohibits the jurisdiction of the State to adjudicate the matter here determined in substantially the same words as the federal act above quoted. Thus, the law expresses the intent of Congress to reserve to the Federal Government the matters stated and it specifically includes treaty fishing rights as a matter withheld from State control.

The question should finally be determined as to whether the *dicta* in the above cases and the holding of the *Umatilla* case, which is based on this *dicta*, allowing regulation of off-reservation fishing rights by the State to a limited extent are still valid. The reservation of jurisdiction to the Federal Government in 18 U.S.C. 1162

is without express qualification as applying to "Indian country" only. This law withdraws Indian treaty fishing rights as an entire subject matter from State jurisdiction.

5. The Supreme Court of the State of Washington, by allowing the entry of an injunction against the Tribe by the trial court, has allowed the imposition of a summary criminal procedure upon the Puyallup Indians, including those who are not parties to this action. The amended injunction (Appendix B, *infra*, p. A-68) in effect prohibits the Puyallup Tribe from commission of future criminal acts. It thereby imposes a double sanction upon its members for the future exercising of their treaty fishing rights. It must be kept in mind that at the time this injunction was entered many of the members of the Tribe had not been individually served, many of its members were infants or perhaps incompetent, and many were yet to be born. No guardian *ad litem* was appointed to protect the rights of the infants and incompetents.

The remedy of the criminal law is adequate. It affords the proper procedure for protection of the suspected violator. The contempt procedure denies most of the fundamental procedural protections. There presently is no protection against double punishment or coercive employment of both remedies by the State. The contempt procedure denies the equal protection of the laws, due process of the law, a right of confrontation of witnesses, presumption of innocence, right to counsel, and right to trial by jury, among other protection afforded in the criminal procedures.

Summary of Reasons

This decision of the Supreme Court of the State of Washington has abrogated the Medicine Creek Treaty of 1854.

a. The determination that the reservation does not exist and the fishing rights within the reservation therefore are non-existent eliminates on-reservation fishing rights. This is clearly beyond the power of the State to determine, control or regulate.

b. The determination that off-reservation fishing rights are subject to the same standards applicable to all citizens, *i.e.*, reasonable and necessary for the protection of the fishery, eliminates in this particular case the ability to effectively catch any fish at all. The State laws and regulations prohibit the only effective means of catching fish in the off-reservation fishing areas.

Therefore, although the decision acknowledges the treaty's existence, all meaningful fishing rights thereunder have been terminated.

The Supreme Court and the trial court of the State of Washington have steadfastly ignored the problems of jurisdiction in the matters affirmatively determined. The only jurisdictional issue that the majority of the State Supreme Court acknowledged was in regard to the existence of a tribe. Undoubtedly it must have occurred to the Supreme Court that the Superior Court had enjoined an organization that it had just determined did not exist. After finding there was no jurisdiction to determine the existence of the Tribe, the State Supreme Court without distinguishing or justifying its position, determined that the Indian reservation no longer exists. There

was no answer to the Tribe's objections to lack of jurisdiction on basis of failure of consent by the Tribe or the United States government to be sued.

The lone dissent by Justice Donworth ably evaluates the principal authorities of the majority opinion. The constitutional supremacy of treaty rights of the United States precludes action impairing such treaty rights, and the Washington courts were without power to act unless authorized by Congress or the authority of the Supreme Court of the United States.

The Ninth Circuit Court of Appeals, in its *Umatilla* decision, ruled that the State may be allowed to regulate where absolute necessity requires it in the off-reservation fishing areas, giving the Indians first priority and consideration. The government of the State of Washington, including its courts, has demonstrated in this case that the Ninth Circuit's faith in the judgment and discretion of the State was misplaced. The State's intent is clearly to abrogate the Indian Treaty in respect to fishing rights. The State of Washington should not be permitted to regulate at all, or the erosion or termination of Indian Treaty rights is a certainty.

This case would merit the review of the U.S. Supreme Court if it only involved one Indian. However, this case will ultimately affect many tribes and thousands of Indians if it is permitted to become the law of the State of Washington. Undoubtedly, a refusal to review this case will cause a change of the law in other States as well.

The State of Washington has clearly asserted its rights to subject Indian treaties to the State's police power. The state has demonstrated it will undertake extreme remedies

to enforce its position against the Indians. The Supreme Court of the United States must act if Indian Treaty rights are to continue to exist.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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